In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1684

BERNARD LIPSEY AND DANIEL WEXLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1971, and a petition for rehearing was denied on April 7, 1971. The petition for a writ of certiorari was filed on May 7, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' statements, made after receiving and acknowledging *Miranda* warnings, were voluntarily given and thus properly admitted in evidence.

2. Whether the evidence showed that the stolen securities in question were a part of interstate commerce at the time petitioners received them.

3. Whether the trial judge erred in giving certain instructions.

STATUTE INVOLVED

18 U.S.C. 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
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> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioners were convicted of receiving stolen stock certificates which were a part of interstate commerce, in violation of 18 U.S.C. 2315. Each was sentenced to

two years' imprisonment. Execution of sentence was suspended with the direction that each serve thirty days in a jail-type institution to be followed by probation for two years. The court of appeals affirmed *per curiam* (Pet. App. 1).

The evidence showed that stock certificates valued at more than $5,000 were stolen in New York and subsequently transported to Los Angeles, California (T. 88-89).[1] On September 24, 1969, petitioner Lipsey telephoned his stockbroker, one Jon Darnall, and asked if he could find a buyer for some "hot" securities (Tr. 15-16). Darnall replied that he would check and call back and then contacted the FBI, with whom he thereafter cooperated (Tr. 16-17).

Later that day, Lipsey telephoned Darnall and arranged a meeting to see the securities (T. 17-19). Petitioner Wexler also attended, and handed Darnall five stock certificates as a sample and an inventory of the remaining certificates (T. 19-23). Wexler stated that he could have millions of dollars worth of securities within a matter of hours (T. 20). Darnall was instructed to notify Lipsey whether he had found a buyer by September 27, after which date the stock certificates would be sent to Miami (T. 20-21, 24).

Darnall obtained a two day extension of this deadline and notified Lipsey on September 29 that he had found a buyer (T. 24-27). The parties agreed to meet in a motel, where Darnall would introduce Lip-

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[1] The parties stipulated to these matters. See Pet. 6. "T." refers to the trial transcript, a copy of which is being lodged with the clerk.

sey and Wexler to the buyer (T. 27-28). FBI agent White accompanied Darnall to this meeting and was introduced to petitioners as the buyer (T. 29). Darnall returned the five sample certificates to Wexler, who produced the remaining stolen certificates from his attaché case (T. 29-30, 64-65). FBI agents then arrested both Lipsey and Wexler (T. 30, 65).

Agent White advised both petitioners of their rights as prescribed under *Miranda* v. *Arizona*, 384 U.S. 436, and gave Wexler a printed form setting forth *Miranda* warnings. Wexler read the form and acknowledged that he understood it, but refused to sign (T. 66-67). Wexler then told the agent that he wanted to say something and made a statement implicating a third man as the source of the stolen securities (T. 68-72).

Another agent again advised Lipsey of his rights and gave him the printed form, which Lipsey read and acknowledged that he understood (T. 83-84). Lipsey stated that he preferred not to sign the form. He then volunteered an oral statement indicating that his conscience had been bothering him and that he was glad he had been caught (T. 84-85).

ARGUMENT

1. Petitioners contend (Pet. 10-12) that it was error to admit as evidence their inculpatory statements because they were made after they had refused to sign the printed forms. They assert that the refusal to sign the form "indicated a desire to remain silent" (Pet. 11), and that therefore all subsequent state-

ments were inadmissible. This is not an acceptable proposition where, as in this case, the record shows that the defendant freely volunteered statements after having been fully advised of his rights. See, *e.g.*, *United States* v. *Van Dusen*, 431 F. 2d 1278, 1280-1281 (C.A. 1); *United States* v. *Osterburg*, 423 F. 2d 704 (C.A. 9), certiorari denied, 399 U.S. 914; *United States* v. *Hayes*, 385 F. 2d 375, 377 (C.A. 4), certiorari denied, 390 U.S. 1006. The contrary holding in *United States* v. *Frazier*, No. 23528, C.A.D.C., decided February 24, 1971, is currently the subject of a petition for rehearing before that court.

2. Nor is there substance to petitioners' contention (Pet. 8-10) that the stock certificates were not in interstate commerce at the time petitioners received them. The stolen securities obviously were in interstate commerce when sent from New York to California. The question here is whether they still were when petitioners received them.

Whether an item has ceased to be in interstate commerce is generally a question for the jury. *Corey* v. *United States*, 305 F. 2d 232, 236 (C.A. 9), certiorari denied, 371 U.S. 956. Here, only three weeks expired between the theft of the securities and their recovery. In this circumstance, the jury could reasonably conclude that the securities had not ceased to be in interstate commerce when petitioners received them.[2] See *Corey* v. *United States*, *supra*. Moreover, it was indicated that the securities would be sent

[2] The trial judge instructed the jury that there was evidence to support either conclusion (T. 339-340). The jury resolved the issue in favor of the government.

to Miami if not sold in California (T. 20-21). From this the jury could find that even if the securities had come to rest in California, they still were so connected with interstate transportation as to be part of it. See *Powell* v. *United States*, 410 F. 2d 710, 713-714 (C.A. 5); *United States* v. *Maddox*, 394 F. 2d 297, 300 (C.A. 4); *Pearson* v. *United States*, 378 F. 2d 555, 560 (C.A. 5).

3. Petitioners' claims (Pet. 12-14) that the trial judge erred in instructing the jury are without merit.

(a) In instructing the jury on the knowledge element of the offense, the trial judge stated (T. 335-336):

> Possession of property recently stolen if not satisfactorily explained is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case that the person in possession knew the property had been stolen.

This is a correct statement of the applicable law, as recently explicated in *Rugendorf* v. *United States*, 376 U.S. 528, 536-537. Nor, contrary to petitioners' assertion, is the inference invalid under *Leary* v. *United States*, 395 U.S. 6. See, *e.g.*, *McAbee* v. *United States*, 434 F. 2d 361 (C.A. 9).

(b) The trial judge included in his instructions on reasonable doubt the following (T. 321-322):

> A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act.

> Proof beyond a reasonable doubt must therefore be proof of such a convincing character that you would be willing to rely upon and act upon unhesitatingly in the most important of your own affairs.
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> * * * *
>
> A reasonable doubt exists, therefore, whenever, after a careful and impartial consideration of all of the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

These instructions were proper. *Holland* v. *United States*, 348 U.S. 121, 140.[3]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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[3] Petitioners' additional contention (Pet. 7-8) that the issuing of a brief per curiam opinion by the court of appeals denied them due process is also without merit.

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